

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH ANTHONY SUTTON,

Defendant-Appellant.

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UNPUBLISHED

March 21, 2000

No. 210250

Macomb Circuit Court

LC No. 97-002727-FH

Before: Murphy, P.J., and Hood and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Defendant was sentenced to thirty-two to forty-eight months in prison, and he now appeals as of right. We affirm.

On September 2, 1997, defendant was stopped for driving with an expired license plate in the City of Warren. Because defendant was also operating a vehicle without a driver's license, police officers placed defendant under arrest and performed a custodial search. During that search, police discovered what was later identified as .43 grams of cocaine.

Before trial, defendant accepted a plea offered by the prosecutor that included a one-year cap on the minimum sentence. However, defendant later withdrew his plea and requested a jury trial. Before the jury was seated, defense counsel stated that he planned to request a jury instruction regarding the misdemeanor offense of use of a controlled substance. MCL 333.7404; MSA 14.15(7404). The judge indicated that he did not believe misdemeanor use was a lesser included offense of the possession charge, but that defense counsel could renew his request at the close of the prosecutor's case. Defense counsel did not renew his request for the misdemeanor instruction at the close of the prosecution's proofs. Nevertheless, defendant took the stand and admitted that he was in possession of powder cocaine on September 2, 1997, and that he was a user and an addict. After this testimony, the court ruled that misdemeanor use was not an included offense of possession and that it would not instruct the jury as to that offense.<sup>1</sup>

Defendant contends he was the denied effective assistance of counsel due to defense counsel's reliance on the availability and appropriateness of this misdemeanor instruction. We disagree.

The failure to move for a new trial or evidentiary hearing to preserve an effective assistance of counsel claim generally precludes appellate review unless the record contains adequate detail to support defendant's claims. See *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To prevail, the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). The defendant must demonstrate that "a reasonable probability exists that, but for counsel's error, the outcome of the proceedings would have been different." *Pickens, supra* at 312; *Rice, supra* at 444.

Defendant contends that, had he known that he would not get a jury instruction regarding misdemeanor use, he would have taken the offered plea bargain instead of proceeding to trial. Further, defendant contends that after the court indicated to defense counsel that such an instruction was inappropriate, counsel was ineffective for pursuing this theory at trial.

The test to determine whether counsel has been ineffective in advising a defendant to go to trial or to plead guilty is whether counsel's assistance enabled the defendant to make an informed and voluntary choice between the two. *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). In this case, defense counsel stated that defendant wished to exercise his right to a jury trial notwithstanding his understanding that, if he should be found guilty, he might be sentenced to a minimum of thirty-six months in prison, rather than the plea cap of twelve months. Because *nothing* in the record indicates that defendant's rejection of the plea bargain or his choice to proceed to trial was involuntary, or that this decision was based on the alleged erroneous advice of counsel regarding the likelihood of receiving a misdemeanor use instruction, this portion of defendant's claim of ineffective assistance is without merit.

Given defendant's failure to prove ineffective assistance with regard to his plea decision, despite counsel's questionable trial decision to pursue the contested strategy in the face of the court's indications that it was unsound, we hold that defendant has failed to demonstrate the prejudice necessary to sustain the secondary portion of his claim. See *Pickens, supra* at 303. When this cause proceeded to trial, the prosecution presented overwhelming proof of defendant's guilt. Defendant's only chance for acquittal was to testify and present some explanation for his possession of the cocaine at the time of his arrest. Though it appears that when defendant took the stand defense counsel may have still erroneously believed that he could get the misdemeanor instruction, counsel ultimately changed strategies and made a cogent, albeit unsuccessful, closing argument that defendant's testimony negated the knowing and intelligent element of the possession charge.

There being no showing of ineffective assistance in connection with the refusal of the plea, we find that despite counsel's initially miscalculated trial strategy, his remaining performance was arguably reasonable. Having failed to show that "a reasonable probability exists that, but for counsel's error, the outcome of the proceedings would have been different," *Pickens, supra* at 312, defendant's claim of ineffective assistance must fail.

Affirmed.

/s/ William B. Murphy

/s/ Harold Hood

/s/ E. Thomas Fitzgerald

<sup>1</sup> The misdemeanor use of a controlled substance is not a lesser included offense of felony possession of cocaine. See *People v Stephens*, 416 Mich 252, 261-266; 330 NW2d 675 (1982). Pursuant to *Stephens*, the offenses must be related so that proof of the misdemeanor also constitutes partial proof of the greater offense. *Id.* at 263-264. In this instance, use is not needed to prove possession. Accordingly, the trial court properly denied defendant's request for the misdemeanor instruction.